UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 3 | Number 1 Article 15

1978

Sovereign Immunity

North Carolina Journal of International Law and Commercial Regulation

SOVEREIGN IMMUNITY: *Smith v. Canadian Javelin Ltd.*, 68 D.L.R. 3d 428 (1976).

Is the authorized agent of an independent state "not acting in a private or commercial capacity or nature, but rather... seeking to enforce legislation of that sovereign State within the jurisdiction of that State"[1] entitled to sovereign immunity? The Ontario High Court has recently decided that in Ontario, Canada the agent is entitled to immunity.

In 1973 the Securities and Exchange Commission [SEC] brought suit in United States District Court for the Southern District of New York, against Canadian Javelin, John C. Doyle and William M. Wismer alleging breaches of securities legislation. A consent judgment was entered against Canadian Javelin, and Canadian Javelin was enjoined from further acts not in compliance with United States securities laws.

A shareholder and director of Canadian Javelin subsequently brought suit in an Ontario court alleging that the servants and agents of Canadian Javelin who gave the consent had no right or authority to enter into the settlement of the action. He therefore sought a declaration from the Ontario High Court declaring the consent judgment to be null, void and illegal. The defendant SEC sought a summary dismissal of the action on the ground that as an authorized agent of an independent state, it was entitled to sovereign immunity.

In its application for dismissal, the SEC relied on both the doctrine of sovereign immunity and the doctrine of qualified sovereign immunity. The Supreme Court of Canada had upheld the doctrine of sovereign immunity in 1944,[2] but in 1968 the Court of Appeal of Quebec repudiated the theory of absolute sovereign immunity.[3] The Quebec court held that instead of adhering to the doctrine of absolute sovereign immunity, it would require the attorney seeking immunity on behalf of a sovereign State to show some valid basis for granting such immunity. The plaintiff in that action was allowed to sue a sovereign state to receover fees for services provided in designing a pavilion at Expo.

In discussing whether the SEC was entitled to immunity, Justice Cory quoted approvingly from an English case which set out four exceptions to the doctrine of sovereign immunity.[4] These four exceptions are: 1) in respect to land situate in England; 2) in respect of trust funds lodged in England or money lodged for payment of creditors; 3) in respect of debts incurred in England for services rendered to the

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[1]Smith v. Canadian Javelin Ltd., 68 D.L.R.3d 428, 432 (1976).

[2]Dessaulles v. Republic of Poland, [1944] 4 D.L.R. 1.

[3]Venne v. Democratic Republic of the Congo, 5 D.L.R.3d 128 (1968).

[4]Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, [1975] 3 All E.R. 961.

state's property there; and 4) when a foreign sovereign enters into a commercial transaction with a trader in England and a dispute arises which is properly within the territorial jurisdiction of English courts.[5] The court assumed that the doctrine of qualified privilege is applicable in Ontario but found that the SEC did not come within any of the exceptions. The SEC was not acting in a private or commercial manner, but rather was enforcing the law and policy of the United States. Acting ae an agent of a sovereign state, the SEC was entitled to immunity, and the Court granted the application for dismissal.

R. K.

[5]68 D.L.R.3d at 431.